# STATE OF MICHIGAN

# COURT OF APPEALS

DENNIS R. HYNES and CONSTANCE HYNES,

Plaintiffs-Appellants,

v

PORT COVE CONDOMINIUM ASSOCIATION and CHARTER TOWNSHIP OF WATERFORD,

Defendants-Appellees.

UNPUBLISHED
February 27, 2007

No. 271558
Oakland Circuit Court
LC No. 2005-067620-CH

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants summary disposition pursuant to MCR 2.116(C)(7) and 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

The factual background of this case is undisputed, but the procedural background is unusually complex and requires a lengthy explanation. In 1981, J&J Slavik, Inc. (Slavik), a developer, received approval from defendant Waterford Township (the Township) of a site plan for a condominium project utilizing two parcels of land on Cass Lake. The original plans entailed construction on one of the parcels, with the other parcel (which the parties call "the island") to be retained in its "natural state." Several of the eventual condominium purchasers based their purchases in part on Slavik's assertions that the island would remain undeveloped. However, the final consolidated master deed that Slavik conveyed to defendant Port Cove Condominium Association (Port Cove) in 1989 ultimately omitted the island. Instead, Slavik sold the island to plaintiffs the Hyneses. Since 1992, the parties have been more or less continuously litigating what rights, if any, the Hyneses have to develop or improve the island.

The disputes most pertinent to the present appeal began in 1995,[1] when the Township filed a complaint seeking to enjoin defendants (including, at the time, Slavik) from cutting trees, mowing, excavating, or doing anything else on the island in alleged violation of the Port Cove site plan (count I) or in violation of the Township's woodlands and wetlands ordinances (counts

[1] The prior actions were apparently voluntarily dismissed before their merits were addressed.

II and III, respectively). Shortly thereafter, Port Cove filed a separate complaint against defendants, alleging, among other things, that Port Cove had been under the belief that the island would belong to the condominium and seeking declaratory judgment that the island was part of the Port Cove condominium (count I(a)), seeking to quiet title to the island (count II), seeking to enjoin defendants from any activities inconsistent with retaining the island "in its natural state (count I(b)-(c)), and seeking damages for violation of deed restrictions (count III). The two cases were subsequently consolidated under Case No. 95-500005-CZ. The parties in that case moved for summary disposition. On March 27, 1997, Judge Edward Sosnick issued a lengthy opinion and order reciting the pertinent underlying facts of the case, denying the Township's motions under the ordinances because there existed questions of fact whether the Hyneses' admitted actions had exceeded the scope of what was permitted under the ordinances, and finding that the site plan was unambiguous, was binding on the Hyneses, and included the island; the trial court therefore granted the Township an injunction requiring the Hyneses to "desist from any activities which would interfere with the natural state of the island parcel."

The trial court further observed that Port Cove relied "on essentially the same facts as" the Township, but additionally "that the condominium was sold on the representation that the development would include the island parcel as a natural area." However, the master deed permitted the developer "to add or withdraw undeveloped land from the development" other than "land necessary for setback and space requirements." The consolidating master deed did not commit the island to the project, the island property had never been included in the development under any of the deed revisions, and the land actually submitted was sufficient to comply with the area and density requirements at the time. The trial court found "no evidence that the developer's promises to retain the island in a natural state were false when made," and the consolidating master deed did not violate the original master deed, so title to the island remained with the Hyneses. The trial court then clarified that the modifications made to the consolidated master deed from the original master deed only affected "the rights and obligations of the condominium developers, owners and association as to each other," and did not change the site plan, which "defines rights and obligations relating to the township." Because the Township never approved a change to the site plan omitting language that the "low land area" was to be "retained in natural state," that requirement remained as a limitation on development in the area. The trial court also clarified that it had *not* held that development could *never* take place in the area, because the Township could agree with the landowners to amend the site plan.

Because of a reorganization in the trial court, the case was reassigned from Judge Sosnick to Judge Richard D. Kuhn. Judge Sosnick's final involvement with the matter was entry of an opinion clarifying the court's previous orders. He "reiterate[d] that Count I of plaintiff Port Cove's complaint sought to enforce the condominium site plan filed with the township" and "that it had not even considered whether a private landowner such as [Port Cove] would have standing to seek to enforce municipal regulations concerning the use of neighboring land." Although the court had granted the Township an injunction to enforce the site plan, it had not addressed whether Port Cove "was also entitled to an injunction based upon the language of the site plan as alleged in Count I of Port Cove's complaint." Because neither party had apparently even raised the issue for summary disposition, Judge Sosnick concluded that "issues pertaining to plaintiff Port Cove's right to an injunction are preserved for consideration by the successor judge in this matter by summary disposition, trial or otherwise."

Judge Kuhn observed that the Hyneses' property was immediately adjacent to Port Cove's property, that the Hyneses' property had originally been part of the Port Cove site plan, and that several purchasers in the condominium project had relied on statements that the Hyneses' property would remain in a natural state. Judge Kuhn therefore found that the owners would suffer distinct damages apart from the general public, so Port Cove had standing to seek an injunction. Judge Kuhn then stated:

> Judge Sosnick has previously granted injunctive relief to the township in the opinion dated March 28, 1997. The plaintiff condominium association shall have the same injunctive relief for the reasons stated in that opinion.

Judge Kuhn then ordered:

> IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Port Cove Condominium Association shall have an injunction against defendants, enjoining any activity which would disturb or disrupt the natural state of the island.
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> IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Port Cove Condominium Association shall have an injunction against defendants, enjoining any activity which would violate the restrictions of the site plan unless duly amended, or enjoining any activity which would violate any provisions of the local woodland and wetland ordinances.

Judge Kuhn did not provide any further rationale for this order. In an unpublished, per curiam opinion, this Court affirmed. *Charter Twp of Waterford v Hynes*, unpublished opinion per curiam of the Court of Appeals, Docket Nos. 224462, 224463, and 224464 (issued March 8, 2002). In that prior appeal, the Hyneses contended among other things that Judge Kuhn erred in granting an injunction to Port Cove. However, that particular dispute on appeal was apparently limited solely to questions involving *the site plan*. As a result, this Court held:

> The trial court properly concluded that there was no genuine issue of material fact concerning the "natural area" designation on the site plan. The trial court properly granted an injunction against the Hyneses for any action inconsistent with the plan. (*Charter Twp of Waterford*, *supra*, slip op. at 3).

This Court also concluded that Port Cove had standing to request the injunction "because Port Cove's request for the injunction was brought on the same grounds as was the township's," and the Hyneses did not challenge the Township's standing. *Id*., slip op. at 2. Port Cove cross-appealed, and in pertinent part this Court concluded that, no matter what rights they had to develop on the property, the Hyneses had title to the island. The remainder of the issues considered by this Court in the prior appeal are not pertinent to the present action.

After this Court issued its opinion in the prior appeal, the Hyneses and the Township negotiated a development plan, which the Township tentatively approved, that would permit the Hyneses to develop a portion of the island parcel. The Hyneses applied for a wetlands permit from the Michigan Department of Environmental Quality, which was denied on the basis of the injunctions. The Hyneses then filed a "motion for declaratory order interpreting prior opinions and orders" in the Oakland Circuit Court, as part of the 1995 consolidated Case No. 95-500005-

CZ, requesting the court to state that the Hyneses were permitted to develop the island pursuant to the amended site plan approved by the Township. Port Cove objected on a variety of bases, including: that the Hyneses were really seeking to overturn the injunctions rather than clarify them; that the court lacked jurisdiction to modify the injunctions because they were affirmed by this Court; that the Hyneses should have commenced a new action in order to obtain the kind of relief they were seeking; and that even if the Township approved a new site plan, Port Cove had received two *separate* injunctions, only *one* of which would be affected by the new site plan. Judge Kuhn denied the Hyneses' motion, with no discussion aside from a bare reference to the reasons stated by Port Cove in its brief opposing the motion. Judge Kuhn retired from the bench, and the Hyneses' subsequent motion for rehearing or reconsideration was equally-tersely denied by Judge Michael Warren. The Hyneses attempted to appeal "as of right" to this Court in Docket Nos. 261858, 261868, and 261869; that appeal was dismissed on April 22, 2005, for lack of jurisdiction "in view of the fact that it is a postjudgment order that is not appealable as a matter of right."

Instead of filing a delayed application for leave to appeal, the Hyneses commenced the present action by filing a Complaint for Declaratory Judgment of Dissolution or Modification of Injunctions and Declaration of Rights and Liabilities in Case No. 05-067620-CH, against Port Cove and the Township. The case was assigned to Judge Fred M. Mester. Port Cove moved for summary disposition on two bases: first, that the issues raised by the Hyneses were barred by res judicata because they had been litigated to a final and unappealed conclusion in Judge Kuhn's order of February 7, 2005; and second, that in any event Judge Kuhn's order was correct because Port Cove had two separate injunctions, one of which was wholly independent of the site plan. The Hyneses argued essentially that, notwithstanding the language of the orders in the prior actions, the only basis Port Cove had for receiving an injunction was the site plan, and "[t]here is no second injunction. The only injunction is based on what the Township has." Judge Mester agreed that the Hyneses had presented a strong argument that Judge Kuhn had never *intended* to create a situation under which the island could never be developed. However, Judge Mester granted Port Cove's motion for summary disposition because the issues and facts were unchanged from the prior actions, and the "actual language of the injunction is not tied to the site plan alone." This appeal followed.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*., 119. The question whether res judicata bars a subsequent suit is a question of law that is reviewed de novo. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

The first question we must address is whether Judge Kuhn's order in fact granted Port Cove one injunction based on the site plan, or two injunctions, one of which is independent of

the site plan. We conclude that Judge Kuhn granted two injunctions, although we believe the "second injunction" was improvidently given.

Judge Sosnick stated that he "did not address whether plaintiff Port Cove was also entitled to an injunction based upon the language of the site plan as alleged in Count I of Port Cove's complaint," leaving that determination to Judge Kuhn. Port Cove alleges that Count I of its complaint actually sought an injunction based on the site plan *and* on misrepresentations by the original site developer about retaining the island in its natural state. We have reviewed Count I of Port Cove's complaint, and we agree that it contains allegations pertaining to those misrepresentations, but the majority of it, including Port Cove's request for relief, is based entirely on the site plan. Judge Sosnick also concluded that "Count I of plaintiff Port Cove's complaint sought to enforce the condominium site plan filed with the township." Judge Kuhn recognized that part of Port Cove's argument was that owners had purchased units in reliance on statements that the island would be kept in its natural state. However, he did so in the context of determining whether Port Cove had "standing to seek an injunction to prevent the violation of the site plan and ordinances governing the use of the island property." Judge Kuhn found in the affirmative, because the condominium owners would suffer sufficient damages apart from and beyond those suffered by the public.

Judge Kuhn then acknowledged the injunction that Judge Sosnick had granted to the Township, and held that Port Cove "shall have the same injunctive relief for the reasons stated in [Judge Sosnick's] opinion." Judge Sosnick had ordered that the "Township's motion for summary disposition as to Count I of its complaint seeking enforcement of the site plan is granted. The [Hyneses] are enjoined from any activity on the island property which would disturb or disrupt its natural state." Although this might be inferred to be an absolute injunction against any and all possible development on the island, Judge Sosnick subsequently clarified: "Nothing in this court's prior opinion holds that the land can never be developed. Clearly . . . the site plan can be amended upon the agreement of the Township and the owners of the land." The injunction granted to the Township was therefore not necessarily about keeping the island in its natural state *per se*, but rather was clearly limited to enforcement of the site plan, which could be modified by agreement between the Township and the Hyneses. If the site plan was changed to that it no longer required the island to be kept in a natural state, the Township's injunction would also no longer mandate that the island be kept in a natural state. Therefore, the conclusion reached in Judge Kuhn's order clearly seems intended to provide *only* that Port Cove is *also* able to enforce the site plan.

However, the text of Judge Kuhn's order itself is different:

> IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Port Cove Condominium Association shall have an injunction against defendants, enjoining any activity which would disturb or disrupt the natural state of the island.
>
> IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Port Cove Condominium Association shall have an injunction against defendants, enjoining any activity which would violate the restrictions of the site plan unless duly amended, or enjoining any activity which would violate any provisions of the local woodland and wetland ordinances.

We believe that Judge Kuhn did not *intend* to grant Port Cove an injunction independent of the site plan, and we are uncertain that Judge Kuhn would have had any basis for doing so in any event. However, "it is axiomatic that a court speaks through its orders." *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971). A plain reading of the text of Judge Kuhn's order leads to only one conclusion: that he did, in fact, grant to Port Cove one injunction to enforce the site plan and another to prevent disruption to the natural state of the island in the abstract. Judge Mester correctly found that Port Cove had a "second injunction."

The next question is whether the doctrine of res judicata precludes the Hyneses from now seeking equitable relief from the burden imposed by the "second injunction." We conclude that the unusual and convoluted nature of this matter, as set forth above, makes this one of the rare cases in which a strict application of res judicata would be inappropriate.

Res judicata is a judicially created doctrine intended to guard parties against multiple lawsuits, to conserve judicial resources, and to promote certainty. *Pierson Sand and Gravel, Inc*., *supra* at 380. "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). The Hyneses argue that Judge Kuhn's terse postjudgment order was neither "final" nor "on the merits," but we do not consider the postjudgment order relevant. The Hyneses effectively conceded that they were seeking to have a portion of the injunctive order struck as "meaning nothing," so the Hyneses' motion was for relief from judgment pursuant to MCR 2.612(C)(1). MCL 2.612(C)(2) specifically states that "[a] motion under this subrule does not affect the finality of a judgment or suspend its operation." The question should properly be whether Judge Kuhn's order that granted the injunctions was a "final order on the merits" for purposes of res judicata. Indeed, it is the effect of that order that the Hyneses now seek to avoid. This Court has previously recognized that that order was a final determination that permitted an appeal by right. *Charter Twp of Waterford, supra*. We conclude that the elements of res judicata are met as to the injunctive order.

However, "[t]he goal of res judicata is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible." *Pierson Sand and Gravel, Inc, supra* at 383. It is "only a tool created by the courts," *id*., 382, and it is therefore not mechanically applied as a matter of necessity whenever the elements are met. The doctrine of res judicata will not apply where the facts change or where new facts develop. *Labor Council, Michigan Fraternal Order of Police v City of Detroit*, 207 Mich App 606, 607-608; 525 NW2d 509 (1994). The doctrine of res judicata will also not apply "where the law changes after the completion of the initial litigation and thereby alters the legal principles on which the court will resolve the subsequent case." *Ditmore v Michalik*, 244 Mich App 569, 581 n 5; 625 NW2d 462 (2001). "The estoppel of a judgment extends only to the facts in issue as they existed at the time judgment was rendered and does not prevent a reexamination of the same questions where facts have changed or occurred which may alter the litigants' legal rights and relations." *People ex rel MacMullan v Babcock*, 38 Mich App 336, 350 n 6; 196 NW2d 489 (1972).

The facts in this case have not remained the same. The record shows that the Township has at least tentatively approved an alteration to the site plan that would permit the Hyneses to develop a portion of the island. We cannot consider such a change in factual circumstances insignificant, considering the heavy emphasis and reliance placed on the site plan in the original

proceedings between the parties here. Although Judge Kuhn granted Port Cove an injunction independent of the site plan, all of the available record evidence shows that the site plan was *the* underlying basis for both injunctions. The circumstances of the present case are materially different from the circumstances of the prior litigation. Moreover, this matter concerns an injunction that arguably forbids the Hyneses from making any economic use of their property. This does not in itself make such an injunction unfair or unjust, but as Judge Sosnick correctly observed, an injunction is inherently an "extraordinary remedy." *Dafter Twp v Reid*, 159 Mich App 149, 163-164; 406 NW2d 255 (1987). Judge Kuhn's reasoning for granting the "second injunction" is tenuous to nonexistent, and the record suggests that it may have been a mistake, given that, notwithstanding Port Cove's subsequent arguments, such an injunction was not clearly contemplated in its original complaint. Our Supreme Court has held that "gratuitous" injunctive relief, "not conforming to the prayer," should not be permitted. *Arlt v King*, 328 Mich 645, 649; 44 NW2d 195 (1950).

Finally, and most importantly, our Supreme Court has recognized that "'[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.'" *First Protestant Reformed Church of Grand Rapids v De Wolf*, 358 Mich 489, 495; 100 NW2d 254 (1960), quoting *United States v Swift & Co*, 286 US 106, 114; 52 S Ct 460; 76 L Ed 999 (1932); see also *Opal Lake Ass'n v Michaywe' Ltd Partnership*, 47 Mich App 354, 367; 209 NW2d 478 (1973) (observing that in a court of equity, "an injunction is always subject to modification or dissolution if the facts merit it"). The nature of the relief granted by Judge Kuhn's order, when considered in the context of its creation and the subsequent changes in the parties' factual circumstances, further militates against application of res judicata here. By way of common example, in the context of child custody proceedings, which involve "issues that are appropriately the subject of periodic redetermination . . . where new facts and changed circumstances alter the status quo," this Court has held that res judicata should not bar "fresh litigation." *In re Pardee*, 190 Mich App 243, 249; 475 NW2d 870 (1991).

Considering the injunctive nature of the remedy, the circumstances surrounding the remedy's creation, the changed circumstances, and the terse explanations provided by courts below, we therefore conclude that this case involves one of the rare situations in which the elements of res judicata are met, but the doctrine itself should not be applied. We do not address the substantive merits of the parties' positions. We hold only that Port Cove has an injunction permitting it to forbid the Hyneses from any activity on the island that would alter its "natural state," but that the doctrine of res judicata should not be applied to that injunction. We also have no occasion to address in any way the injunctions that are based on the site plan.

We affirm the finding that Judge Kuhn granted Port Cove an injunction independent of the site plan, we reverse the finding that res judicata should bar this action, and we remand for further proceedings. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Deborah A. Servitto

I concur in result only.

/s/ Kirsten Frank Kelly